

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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WILLIAM J. BRADY,

Plaintiff-Appellant,

V

ROBERT ALLAN BRADY and DR. GARY  
ELLIS, DVM,

Defendants-Appellees.

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UNPUBLISHED

August 3, 2001

No. 222875

Calhoun Circuit Court

LC No. 98-005097-NO

Before: Hood, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's orders granting defendants' motions for summary disposition. We affirm.

Plaintiff's brother, defendant Robert Allan Brady, drove by a pasture that was owned by the estate of the brothers' father. Defendant Brady observed a dead cow lying in the pasture and notified police. Officer Graham of the Pennfield Township police investigated the allegation and observed a dead cow from the roadway. The officer approached the scene and observed a second dead cow in the pasture. There was no water or food available for the living cows in the pasture. Officer Graham contacted the prosecutor's office regarding the legality of entry onto an open field and the Humane Society regarding the condition of the cows. The officer was advised by the prosecutor's office that a warrant was not required for entry onto the area and that the animals could be seized by the Humane Society based on their condition.

A veterinarian, defendant Dr. Gary Ellis, was called to the scene.<sup>1</sup> Dr. Ellis entered the property with Officer Graham. Dr. Ellis performed a necropsy on the dead cow and took blood and stool samples from one of the remaining live cows. He determined that the cows were dehydrated, malnourished, and lacked proper shelter. An appearance ticket was issued to plaintiff for "cruelty to animals due to lack of feeding and providing water" pursuant to MCL 750.53, and two counts of "failure to bury" a dead cow and dead calf pursuant to MCL 287.671.

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<sup>1</sup> It is unknown whether defendant Dr. Ellis was called to the scene by the police or the Humane Society.

Review of the police report indicates that the case was closed because of the conduct and representations of plaintiff. The cows that were in peril were transferred to an area where they would receive food and water. Additionally, plaintiff's neighbor agreed to assist in caring for the animals. Plaintiff, acting in propria persona, filed suit against defendant Brady alleging intentional infliction of emotional distress. The complaint also alleged "invasion of privacy" against defendant Dr. Ellis for his conduct in examining and removing samples from the cows. The trial court granted defendants' motions for summary disposition.

Plaintiff first argues that the trial court erred in granting defendant Brady's motion for summary disposition. We disagree. Our review of a summary disposition decision is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A plaintiff must set forth four elements to establish a prima facie case of intentional infliction of emotional distress: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Haverbush v Powelson*, 217 Mich App 228, 233-234; 551 NW2d 206 (1996). The conduct complained of must be "so outrageous in character and so extreme in degree, as to exceed all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* at 234. Whether the conduct is so extreme and outrageous to withstand a motion for summary disposition must be determined by the trial court as a matter of law. *Duran v The Detroit News, Inc.*, 200 Mich App 622, 630; 504 NW2d 715 (1993). In the present case, the conduct alleged was insufficient to withstand a motion for summary disposition. Defendant Brady merely reported that dead animals were visible from the roadway, an allegation that was confirmed by Officer Graham. Even if this allegation was false, it is not enough that defendant Brady acted with criminal intent or malice. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602-603; 374 NW2d 905 (1985), quoting Restatement Torts, 2d, § 46, comment d, pp 72-73. The law will not intervene where feelings are hurt, and there must be freedom to express an unflattering opinion. *Id.* Accordingly, the trial court properly granted defendant Brady's motion for summary disposition.

Plaintiff next argues that the trial court erred in failing to allow plaintiff to take testimony from Officer Graham at the motion for summary disposition hearing. We disagree. This issue was not raised and addressed below, and therefore, it is not preserved for appellate review. *Camden v Kaufman*, 240 Mich App 389, 400 n 2; 613 NW2d 335 (2000). At the summary disposition hearing addressing the claim against defendant Dr. Ellis, the trial court stated that it would not be able to hear testimony that morning. When it was learned that Officer Graham was present at the hearing, the trial court advised plaintiff to discuss the matter with the officer in the conference room, but the officer would not be under oath because a deposition was not taking place. Plaintiff did not object to that course of action. When the case was recalled on the record, plaintiff revealed the information learned from Officer Graham and did not object to the failure to take testimony or request an adjournment for additional time for discovery. See MCR 2.116(H)(2)(b). Plaintiff may not agree to a course of conduct in the trial court and object to that conduct on appeal. To do otherwise would allow a party "to harbor error as an appellate parachute." *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989).

Plaintiff next argues that the trial court erred in granting defendant Dr. Ellis' motion for summary disposition. We disagree. Our review of this issue is de novo. *Spiek, supra*. The four types of invasion of privacy claims are: (1) intrusion upon plaintiff's seclusion or solitude; (2)

public disclosure of embarrassing private facts about the plaintiff; (3) publicity that places the plaintiff in a false light in the public eye; and (4) appropriation of the plaintiff's name or likeness to the advantage of the defendant. *Lewis v Dayton-Hudson Corp*, 128 Mich App 165, 168; 339 NW2d 857 (1983). Plaintiff's claim of invasion of privacy involves intrusion upon plaintiff's seclusion. This claim of invasion is analogous to a trespass. *Id.* In order to maintain a claim based on seclusion, a plaintiff must prove: (1) an intrusion by defendant; (2) into a matter which plaintiff has a right to keep private; and (3) through the use of a method that is objectionable to a reasonable person. *Id.* at 168-169. "[T]he right to be free from intrusion is not absolute." *Id.* at 169. It does not extend to subvert those rights that spring from social conditions, such as business relations, or to prohibit the publication of material that is of a public or general interest or benefit. *Earp v City of Detroit*, 16 Mich App 271, 276; 167 NW2d 841 (1969).

In the present case, plaintiff has failed to establish a claim of intrusion. While defendant Dr. Ellis admitted to an entry upon the land and the removal of samples from the cows, plaintiff has failed to establish that he had the right to keep this matter involving the cows private. At the time of the entry, defendant Brady alleged that the property belonged to the estate, and plaintiff has failed to dispute that allegation. Furthermore, the condition and treatment of animals as well as the prompt burial of dead animals involve matters of concern to the general public. See also *Saldana v Kelsey-Hayes Co*, 178 Mich App 230, 234; 443 NW2d 382 (1989). Plaintiff has failed to meet the requirements for the tort of invasion of privacy. *Lewis, supra*, at 168-169.

We note that plaintiff's complaint implies that an invasion of privacy claim is also based on the search and seizure provisions of the Michigan Constitution, Const 1963, art 1, § 11. Both the Fourth Amendment of the United States Constitution, US Const Am IV, and the parallel provision of the Michigan Constitution guarantee the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. "The Michigan Constitution imposes no higher standard than that imposed by the United States Constitution." *People v Rasmussen*, 191 Mich App 721, 725; 478 NW2d 752 (1991). The conduct proscribed applies only to government action, and a search and seizure, even if unreasonable, conducted by a private person is not included within the constitutional provisions. *People v McKendrick*, 188 Mich App 128, 141; 468 NW2d 903 (1991). Furthermore, there is no seizure when an object discovered by a private individual is voluntarily turned over to the government. *Id.* at 143. Pursuant to *McKendrick, supra* at 143,<sup>2</sup> plaintiff failed to make the requisite showing of state

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<sup>2</sup> In *McKendrick*, we held that grass cutters sent to cut the defendant's grass who were advised to report illegal or suspicious findings did not result in the requisite showing of state action to sustain a search and seizure challenge.

action for purposes of demonstrating a constitutional action for invasion of privacy based on any alleged violation of the provisions against illegal search and seizure.

Affirmed.

/s/ Harold Hood

/s/ William C. Whitbeck

/s/ Patrick M. Meter